Case Western Reserve Journal of International Law

Volume 43 | Issue 1

2010

The Status of Corporations in the Travaux Preparatoires of the Genocide Convention: The Search for Personhood

Michael J. Kelly

THE STATUS OF CORPORATIONS IN THE *TRAVAUX PRÉPARATOIRES* OF THE GENOCIDE CONVENTION: THE SEARCH FOR PERSONHOOD

Michael J. Kelly[*]

Can corporations be prosecuted for complicity in genocide? While companies do not typically carry out genocides on their own, they often provide the necessary means such as supplying Saddam Hussein with chemical gas components to perpetrate the Kurdish genocide, machetes to the Rwandan government to further the Rwandan genocide, or small arms to Bosnian Serb militias to exterminate Bosniak males at Srebrenica.[1]

Pursuit of this deceptively simple question leads into a complex scholarly inquiry.[2] One aspect of this inquiry, and the subject of this short essay, is whether the drafters of the 1948 Convention on the Prevention and Punishment of Genocide (Genocide Convention) conceived that such might be the case.[3] After all, while corporations like Krupps were implicated at Nuremberg, it was only individual corporate officers, not the companies, that were formally prosecuted for crimes amounting to genocide.[4]

In 2007, the International Court of Justice held that states could commit genocide.[5] So if states can commit genocide, then, logically, why cannot other legal persons, namely corporations?

---

[*] Professor of Law and Associate Dean for Faculty Research & International Programs, Creighton University School of Law. Professor Kelly is President of the U.S. National Chapter of L'Association Internationale de Droit Pénal (AIDP) and a member of the International Association of Genocide Scholars (IAGS). The author notes with profound thanks the work of Hirad Abtahi and Philippa Webb in developing and publishing the *travaux* of the Genocide Convention, which aided the examination of this essay's central question immeasurably.

[1] *See* Norm Dixon, *How the U.S. Armed Sadaam Hussein with Chemical Weapons*, GREEN LEFT WEEKLY (Aug. 28, 2002), http://www.greenleft.org.au/node/26825 (explaining how the United States helped Iraq develop its chemical, biological and nuclear weapons programs). *See* LINDA MELVERN, CONSPIRACY TO MURDER—THE RWANDAN GENOCIDE 56 (Verson 2006) (explaining how corporations supplied weapons that were used in the Rwandan genocide).

[2] Other equally important threshold questions concerning the status of corporations under international law, amenability to prosecution, and tribunal jurisdiction are pursued elsewhere and not covered in this segment of the broader inquiry.

[3] *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*] (defining genocide to be a crime under international law in times of peace or in times of war).

[4] *See* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1105–1111 (2009).

[5] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, ¶¶ 143, 413 (Feb. 26),

First, what is genocide? The illegal acts of genocide are defined in the Genocide Convention:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[6]

Second, who can commit genocide? Article 6 of the Genocide Convention covers individual responsibility: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[7] There is no artificial distinction between natural or legal (juridical) in either the reference to "persons" or "private individuals," whereas such distinction is specifically made in later international criminal treaties. Thus, corporate liability could therein lurk.

An exploration of what the Genocide Convention drafters were thinking does not dampen this prospect. The authoritative interpretive guide to treaties, the Vienna Convention on the Law of Treaties, urges one to first look to the plain meaning of the words in the treaty and, should ambiguity remain, to resort to an examination of the preparatory notes to divine the drafters' intent.[8] During the exact period when the Genocide Convention was being negotiated from 1946–1948, the legal definition of "person" according to Ballentine was:

Persons are divided by law into persons natural and persons artificial, and 'person' *prima facie*, at common law and apart from any statutory

available at http://www.icj-cij.org/docket/files/91/13685.pdf (deciding that under Article I of the Genocide Convention, states are obligated not to commit genocide and that under Article IX of the Convention, the ICJ has jurisdiction to decide a state's responsibility for committing genocide in violation of the Convention).

6 *Genocide Convention*, *supra* note 3, art II.

7 *Id.* art. VI.

8 Vienna Convention on the Law of Treaties, art. 31–32, *done* May 23, 1969, 23 U.S.T. 3227, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

enactment, includes both natural and artificial persons, and therefore as a general rule includes corporations.[9]

Moreover, the criminal versus civil nature of the Genocide Convention was not dispositive as to whether corporations would be included in the term "person," according to the usage of the term well prior to time of the drafting conference:

> Corporations are to be deemed and considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute; and prima facie the word 'person' in a statute, though penal, which is intended to inhibit an act, means 'person in law;' that is, an artificial, as well as a natural, person, and therefore includes corporations if they are within the spirit and purpose of the statute.[10]

References to corporations or legal or juridical persons in the *travaux preparatoires* is meager. But, as the above commentary makes clear, in conjunction with the discussion of who could commit genocide, it was on the minds of several delegates. Specifically, the Soviet delegate emphasized corporate liability in the context media and press organizations using propaganda to incite to genocide.[11] The delegate was also in favor of blanket application of liability, "stress[ing] the fact that the fundamental idea of article V [liability] of the draft convention was to proclaim that *all those committing genocide, no matter who they were, should be punished*."[12]

---

[9] 13 AM. JUR. *Corporations* § 9 (1938). BALLENTINE'S LAW DICTIONARY 622 (2d ed. 1948). This understanding reflects a long history recognizing that both rights and duties devolve onto corporations as legal persons. *See* HORACE L. WILGUS, CASES ON THE GENERAL PRINCIPLES OF THE LAW OF PRIVATE CORPORATIONS §§1–10 (1902). 7 CORPORATIONS REPRINTED FROM RULING CASE LAW §3 (1915) ("The corporation is the real though artificial person substituted for the natural persons who procured its creation . . . It must do all corporate acts in its corporate name. . . . Neither a portion nor all of the natural persons who compose a corporation . . . are the corporation itself. . . ."). *See also id.* at §8 (where corporations were held by courts to constitute "persons" as that term was used in the 5th and 14th Amendments to the U.S. Constitution and in an 1873 treaty between the United States and England prohibiting future confiscations, and §9 reiterating that corporations should be presumed covered in statutory language).

[10] CORPORATIONS REPRINTED, *supra* note 9, §9.

[11] 1 HIRAD ABTAHI AND PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 741–49 (2008). The Soviet delegate also introduced a new article contemplating organizational liability for organizations that "aimed at stirring up racial, national or religious hatred and inciting to commission of acts of genocide" but this motion was defeated. *Id.* at 1799–1814. Although the proposal was explained by the Czech delegate to encompass only groups like the Gestapo, the S.A., and the S.S., the United States stridently opposed it as an assault on freedom of the press. *Id.* at 1809.

[12] *Id.* at 1591–92 (emphasis added).

Other delegates made oblique references to legal persons in the context of the debate over the term "constitutionally responsible rulers."[13] Whether such references reflected an intentional application to the corporate body considered in this essay or to governments in their corporate context remains an open question. The delegates certainly referred to governments and states, as the U.S. delegate reflected on the 96th meeting, "It had then been decided that corporate bodies such as Governments and States should not be included in the list of those to be held responsible for the commission of genocide."[14] But did these references embrace companies? We simply do not know.

For instance, the Venezuelan delegate was skeptical about bringing legal persons before an international tribunal, noting, "it was easy to picture the difficulty of bringing judgment the corporate bodies which, as a general rule, were the perpetrators of the crime of genocide."[15] The Swedish delegate favored an interpretation limiting liability due to the fact that "the Swedish criminal code did not recognize the idea of penal responsibility of legal persons"—a position echoed by the delegate from the Dominican Republic.[16] And the French delegate noted that "The French idea of penal responsibility applied to individuals only, for only individuals could commit crimes; it could not apply to corporate bodies or to abstract communities."[17]

But the delegate from the Philippines declared that "any individual guilty of genocide should be punished, whoever he might be."[18] And, finally, summing up the debate, the delegate from Luxembourg said: "The question under consideration was to decide who would be liable to punishment for the crime of genocide. [T]he Committee had decided that *all individuals*, whether they were constitutionally responsible rulers, public officials or private individuals, *would be responsible for the act of genocide*."[19]

So inclusion of corporations in the term "persons" is not foreclosed by a reading of the *travaux*; nor is inclusion of corporations in the term "private individuals."[20] Indeed, the Chinese delegate noted that "genocide

---

13 *Id.* at 1592–96.

14 *Id.* at 1694.

15 *Id.* at 1222. Although the Venezuelan delegate could have been referring to states and governments by using the term corporate bodies, this is somewhat unclear as reference is made by other delegates to states and heads of states as chief perpetrators of genocide. *See, e.g.*, the statement of the Pakistani delegate, *id.* at 1595 (noting that, most often, genocide is committed by heads of state).

16 *Id.* at 1595, 1662 ("[U]nder the national legislation of his country, legal entities could not be held guilty of committing a crime").

17 *Id.* at 1617. Chaumont went on to endorse the phrase "responsible rulers" for inclusion in draft article V.

18 *Id.* at 1642.

19 *Id.* at 1655 (emphasis added).

20 *Id.* at 1593–94. One of the few exclusionary elucidations on this last point came from the Syrian delegate who said, when considering what to do with de facto heads of state, "they

could also be committed by private organizations."[21] And the Swedish delegate specifically included "private organizations" in his references to "private individuals" in the debate beating back a French amendment to exclude private individuals from liability altogether:

> According to the French amendment, genocide could by committed only by rulers or at least with their connivance or collusion; *acts of genocide committed by private individuals or by private organizations* would not be subject to the terms of the convention . . . The Swedish delegation did not think that the force of the convention would be weakened if cases of genocide committed by private individuals or private organizations were included among the acts to which the convention applied. For one thing, it should not be forgotten that such cases might well occur. Furthermore, it should be kept in mind that . . . the draft convention . . . provided for the punishment of certain offences, such as direct instigation to commit genocide, which preceded the crime and were generally committed by private individuals or private organizations without any participation on the part of the rulers.[22]

Again, any indication of inclusion is merely speculative, as it was the Swedish delegate who reminded the drafters that legal persons could not be prosecuted in the discussion about heads of state, but then also coupled private organizations with private individuals.[23] But there is equally no definitive exclusion apparent in the *travaux*. Consequently, one may certainly argue that "persons" and "private individuals" does not preclude the inclusion of corporations as legal persons.[24]

---

would not be included in the category of 'private individuals' envisaged in article V—since that category referred only to private individuals who were neither officials nor heads of State." *Id.* at 1594.

[21] *Id.* at 724. This was in the debate over what to do with political groups. Eventually political groups were specifically taken out as a protected class at the insistence of the Soviets, but were arguably left in as potential perpetrators. *Id.* at 2029. The Chinese delegate also "expressed doubts about the inclusion of both political groups and groups of opinion in the definition. If such groups were included, there was, in fact, no good reason why social, economic and other groups should not be included." *Id.* at 724.

[22] *Id.* at 1462 (emphasis added). In this same vein, the delegate from the Philippines observed in a later debate on incitement, "[E]ven from the political point of view, the prohibition of incitement to genocide by private individuals or groups acting independently of their Governments could only relieve international tension, and not increase it." *Id.* at 1541.

[23] *Id.* at 1462–63. The Swedish delegation was arguing against the French amendment and its exclusion of private individuals from Article II of the Convention.

[24] Black's Law Dictionaries of the period are no help in resolving this matter. Both the third edition (1933) and the fourth edition (1951) track BALLENTINE's dichotomy (above), and note:

It has been held that when the word person is used in a legislative act, natural persons will be intended unless something appear in the context to show that it applies to artificial persons (citations to court cases omitted). But as a rule corporations will be considered persons with-

Not surprisingly, there is a split in the legal academic literature on this point. Some scholars, including the dean of Yale's law school, argue that corporations can aid or abet genocide under Article 4 of the Genocide Convention.[25] Others have adopted a more restrictive interpretation of the list of possible perpetrators of genocide:

> The language of the Genocide Convention is indicative of an intention to confine liability under international law for acts of genocide to natural persons only. It provides that "persons" committing genocide, or any of the other acts included in the Genocide Convention's proscriptions, shall be punished. Although "persons" as a juridical concept includes natural as well as juristic persons, the Article expressly refers to "responsible rulers, public officials or private individuals" as examples of persons who might be punishable. Restrictive interpretation of this provision—the general norm of construction that applies to punitive provisions—and in particular application of the *eiusdem generis* rule, would suggest that an accused under the Genocide Convention, ought to be confined to those who have something in common with "responsible rulers, public officials or private individuals:" that is, natural persons to the exclusion of juristic persons, including the state as a corporate body with legal subjectivity.[26]

Similarly, there is a split in the judiciary on the matter. District Court Judge Allen Schwartz used the argument to rebuff the corporate defendant's assertion in *Talisman Energy* that the Nuremberg trials focused only on individual corporate officers and not the corporate entities themselves.[27] Allegations of complicity in genocide had been leveled against the company in that case:

---

in the statutes unless the intention of the legislature is manifestly to exclude them (citations to court cases omitted).

BLACK'S LAW DICTIONARY 1355 (3d ed. 1933); BLACK'S LAW DICTIONARY 1300 (4th ed. 1951). As the *travaux* neither specifically includes nor excludes corporations in the term persons, assuming the drafting committee could be analogized to a legislature and the resulting draft treaty to a statute, the question remains unresolved.

[25] Harold Hongju Ku, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 266 (2004).

[26] Johan D. Van Der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 290 (1999). *See also*, Ben Saul, *In The Shadow Of Human Rights: Human Duties, Obligations, And Responsibilities*, 32 COLUM. HUMAN RIGHTS L. REV. 565, 596 (2001) ("International human rights law presently recognizes the implied recognition of correlative duties owed to facilitate the exercise of specific rights. Yet many early human rights treaties were 'silent as to the roles of other or alternative addressees in regard to promoting and protecting specific rights.' For example, the *Genocide Convention* envisaged only the punishment of *natural* 'persons,' and was silent on the responsibility of governments, *corporations*, media entities, or political parties.")(emphasis added).

[27] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 316 (S.D.N.Y. 2003).

The concept of corporate liability for *jus cogens* violations has its roots in the trials of German war criminals after World War II. The Nuremberg Charter permitted the prosecution of "a group or organization" and allowed the tribunal to declare that entity a "criminal organization." In *United States v. Flick, United States v. Krauch,* and *United States v. Krupp,* the heads of major German corporations were prosecuted for, *inter alia*, war crimes and crimes against humanity. Talisman points out, correctly, that in each of these cases, individuals, and not corporate entities, were put on trial. However, it ignores the fact that the court consistently spoke in terms of corporate liability:

> With reference to the charges in the present indictment concerning Farben's [a German corporation] activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 *were committed by Farben,* and that these offenses were connected with, and an inextricable part of the German policy for occupied countries. [. . .]. The *action of Farben* and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. [. . .] Such *action on the part of Farben* constituted a violation of the Hague Regulations [on the conduct of warfare] (citing United States v. Krauch).[28]

The language of the decision makes it clear that the court considered that the corporation *qua* corporation had violated international law. The same logic guided the court in a case involving the Krupp corporation:

> The confiscation of the Austin plant [a tractor factory owned by the Rothschilds] [. . .] and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations [. . . and] the Krupp firm, through defendants[, . . .] voluntarily and without duress participated in these violations. (citing United States v. Krupp).[29]

As in *Krauch,* the *Krupp* court makes it clear that while individuals were nominally on trial, the Krupp company itself, acting through its employees, violated international law. The Nuremberg precedent cited above is particularly significant not merely because it constitutes a basis for finding corporate liability for violations of international law, but because the language ascribes to the corporations involved the necessary *mens rea* for the commission of war crimes and crimes against humanity—the types of criminal behavior at issue in the instant case.[30]

---

28 *Id.* at 315–16.
29 *Id.* at 316.
30 *Id.* at 315–16.

Thus, the concept of holding corporations accountable under international criminal law for their complicity in genocide has been around for some time, even if it has not been acted upon. While no currently constituted international tribunal would have jurisdiction over such a case, nothing in the Genocide Convention appears to prevent one from commencing. This is an important point if, perhaps in the future, one of the competent international criminal tribunals is vested with that jurisdiction.

Along with rights come responsibilities. The rights of corporations have expanded greatly in the age of globalization, but there has not been a commensurate effort to impose obligations—such as compliance with the *jus cogens* norm codified in the Genocide Convention against the commission of genocide. If corporations are "persons" under the law, then they should be more fully so. If the result of holding corporations liable for their actions is the disarming of tyrants who seek to carry out genocide—few since the Second World War manufacture their own weapons—then perhaps fewer genocides would be committed, or at least the scale of massacre might be reduced. That result is certainly worth the effort.